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## UNITED STATES DISTRICT COURT

### EASTERN DISTRICT OF CALIFORNIA

JACK ORLANDO JOHNSON, ) CV F 99 5982 SMS P  
Petitioner, ) ORDER REGARDING PETITION FOR WRIT  
v. ) OF HABEAS CORPUS  
C. A. TERHUNE, ) (Document 1)  
Respondent. )

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), the parties have consented to the jurisdiction of the United States Magistrate Judge.

#### BACKGROUND<sup>1</sup>

On July 18, 1995, in the Kern County Superior Court, a jury found Petitioner guilty of the following: (1) Two counts of kidnap for robbery, in violation of California Penal Code section 209(b)<sup>2</sup>; (2) One count of kidnap, in violation of section 207; and (3) Two counts of second

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<sup>1</sup> This information is derived from Petitioner's petition for writ of habeas corpus and Respondent's answer to the petition.

<sup>2</sup> All further statutory references are to the California Penal Code, unless otherwise noted.

1 degree robbery, in violation of section 212.5(c).<sup>3</sup> The jury found the personal weapon use  
2 allegation untrue. The jury found true the allegations that Petitioner had suffered a prior serious  
3 and/or violent felony within the meaning of section 667(a) and (c)-(e), and that Petitioner had  
4 served two prior prison terms within the meaning of section 667.5(b).

5 On August 15, 1995, the court sentenced Petitioner to state prison for a total determinate  
6 term of 23 years, plus two consecutive indeterminate sentences of life with the possibility of  
7 parole.

8 On August 15, 1995, Petitioner filed a timely notice of appeal in the Fifth District Court  
9 of Appeal.

10 On October 25, 1996, at the request of the California Department of Corrections, the trial  
11 court resentenced Petitioner to an aggregate determinate term of 23 years, plus four consecutive  
12 life terms with the possibility of parole.

13 On November 13, 1996, Petitioner filed a timely notice of appeal in the Fifth District  
14 Court of Appeal. On January 28, 1997, the Fifth District consolidated Petitioner's two pending  
15 cases.

16 On August 8, 1997, the Fifth District affirmed Petitioner's conviction and modified  
17 Petitioner's sentence to the following: two consecutive indeterminate terms of 14 years to life for  
18 Petitioner's conviction of two counts of kidnap for robbery, consecutive to a determinate term of  
19 23 years for Petitioner's conviction for kidnap with enhancements.

20 On or about September 12, 1997, Petitioner filed a petition for review with the California  
21 Supreme Court. On October 22, 1997, the petition was denied.

22 On October 7, 1998, Petitioner filed a petition for writ of habeas corpus in the Kern  
23 County Superior Court. The court denied the petition on December 11, 1998. Petitioner filed a  
24 motion for reconsideration, which was denied on March 11, 1999.

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26  
27 <sup>3</sup> The guilty verdicts returned relate to two separate incidents on April 9, 1995 and April 11, 1995.  
28 Petitioner was also charged with kidnap for robbery, kidnap, and second degree robbery stemming from a third  
incident, on March 13, 1995. However, the trial court declared a mistrial on the counts relating to this third  
incident. (RT 368.)

1 On March 26, 1999, Petitioner filed a petition for writ of habeas corpus in the Fifth  
2 District Court of Appeal. The court denied the petition on April 8, 1999.

3 On April 19, 1999, Petitioner filed a petition for review in the California Supreme Court.  
4 The court denied the petition on June 16, 1999.

5 On June 29, 1999, Petitioner filed the instant federal petition in the United States District  
6 Court for the Eastern District of California, Sacramento Division. On July 13, 1999, the action  
7 was transferred to this Court. Petitioner sets forth the following grounds for relief: (1) Trial  
8 counsel was ineffective for failing to investigate Petitioner's mental state regarding his  
9 competence to stand trial and/or as a possible mental state defense to the crimes charged; and (2)  
10 The California courts have denied Petitioner due process and equal protection by failing to afford  
11 Petitioner an evidentiary hearing.

12 On January 18, 2000, Respondent filed its answer.

13 On March 7, 2000, Petitioner filed his traverse. On July 24, 2000, Petitioner submitted  
14 supplemental exhibits in support of his traverse.

15 STATEMENT OF FACTS

16 Prosecution Evidence<sup>4</sup>

17 On April 9, 1995, Travis L. went home after work to retrieve some movie videos to return  
18 to the Wharehouse on Ming Avenue and Real Road in Bakersfield. Travis was driving his 1987  
19 Chevy Sprint. At approximately 6:45 p.m., he returned the videos, shopped in the store for about  
20 30 minutes, then left and began driving toward Real Road. As Travis slowed to cross a speed  
21 bump in the parking lot, Petitioner opened the front passenger door and got inside the car. Travis  
22 did not know Petitioner and had not seen him before. Petitioner appeared to have a "shiny blade  
23 or something" in his left hand which he held at the area of Travis's waist. Travis thought the  
24 shiny object was a weapon.

25 Petitioner told Travis to drive to Ming Avenue and New Stine Road and to make a left  
26 turn onto New Stine. Petitioner then told Travis to turn right onto Appleblossom. After Travis

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28 <sup>4</sup> The facts comprising the Prosecution's evidence are taken from the Fifth District's opinion affirming the  
conviction, which this Court adopts as a correct statement of facts.

1 made the right turn, Petitioner told Travis to pull over. When the car stopped, Petitioner  
 2 demanded Travis's wallet. Petitioner took \$22 from the wallet, got out of the car, dropped the  
 3 wallet outside the car, and fled into some neighboring apartments. Travis did not see an object in  
 4 Petitioner's hand when he left the car.

5 Travis picked up his wallet and drove home. Once there, he called the police. Travis's  
 6 mother and aunt were home at the time. The police dusted the Chevy Sprint for fingerprints,  
 7 which were identified as Petitioner's.

8 Shortly before 10 p.m. on April 11, 1995, 17-year-old Kimberly A. and 18-year-old  
 9 Reggie Alvarez were at Wilson Park in Bakersfield. Reggie was playing basketball with several  
 10 other young men while Kimberly sat on the sideline writing in a baby book. Petitioner, who  
 11 introduced himself as "Jack," was also playing basketball. Prior to that evening, neither  
 12 Kimberly nor Reggie had known Petitioner. At one point, Petitioner asked Reggie and Kimberly  
 13 to give him a ride, but Kimberly refused because she had to pick up her baby at Reggie's  
 14 mother's house.

15 The lights on the court went out at 10 p.m. After the others left, Petitioner, Reggie and  
 16 Kimberly remained. Kimberly and Reggie began walking to their car, followed by Petitioner  
 17 who was carrying a shirt and a duffel bag in his hand. When they got to the car, Petitioner told  
 18 them to "get in the car" or he would shoot them. Petitioner told them he had a gun and told  
 19 Kimberly to sit in the front seat. Kimberly was frightened by Petitioner's statement and his  
 20 physical size. She sat in the backseat, and Petitioner sat in the front passenger seat. Petitioner  
 21 told them to take him to Lucky's shopping center, which was three or four minutes away.

22 At Lucky's shopping center, Petitioner told Reggie to park in the back where no one was,  
 23 and after they stopped, told Reggie to give him his wallet. Reggie gave Petitioner the cash from  
 24 his wallet. Petitioner got out of the car and fled to some nearby apartments.

25 Reggie drove home, where he and Kimberly called the police. Two weeks later,  
 26 Kimberly identified Petitioner as the robber from a photo line-up.

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1                   Defense Evidence

2                   Petitioner took the stand in his own defense. Petitioner testified that on April 9, 1995, he  
 3 was using a payphone when he saw Travis L. driving in his vehicle. Petitioner stated that he got  
 4 Travis's attention from the phone booth, and Travis rolled down his window and asked if he  
 5 could help Petitioner. Petitioner then offered Travis \$10 in exchange for a ride. Petitioner stated  
 6 that during the ride, Travis asked Petitioner if he could get him marijuana. After continuing  
 7 driving and stopping several times in their search for marijuana, Petitioner eventually obtained  
 8 marijuana for Travis. Petitioner denied forcing Travis to go anywhere, and denied using a  
 9 weapon.

10                  Petitioner further testified that on April 11, 1995, he was playing basketball with Reggie  
 11 Alvarez. When they were finished playing, Petitioner asked Reggie for a ride. Reggie agreed,  
 12 and while Petitioner, Reggie, and Kimberly A. were getting into the car, Reggie asked Petitioner  
 13 if he could get him marijuana. Petitioner stated that Kimberly became upset with Reggie for  
 14 asking for marijuana. Petitioner testified that they drove to his apartments, and Reggie and  
 15 Kimberly waited in the car while Petitioner attempted to find marijuana. Petitioner failed to find  
 16 any, and when he returned to the parking lot, Reggie and Kimberly were gone. Petitioner denied  
 17 forcing Reggie and Kimberly to go anywhere.

18                   DISCUSSION

19                  A.     Jurisdiction

20                  Relief by way of a petition for writ of habeas corpus extends to a person in custody  
 21 pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws  
 22 or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v.  
 23 Taylor, 529 U.S. 362, 375, 120 S.Ct. 1495, 1504 fn.7 (2000). Petitioner asserts that he suffered  
 24 violations of his rights as guaranteed by the U.S. Constitution. The challenged conviction arises  
 25 out of the Kern County Superior Court, which is located within the jurisdiction of this Court. 28  
 26 U.S.C. § 2254(a); 2241(d).

27                  On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act  
 28 of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed after its

1 enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997), *cert. denied*, 522 U.S.  
 2 1008, 118 S.Ct. 586 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (quoting  
 3 Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996), *cert. denied*, 520 U.S. 1107, 117 S.Ct.  
 4 1114 (1997), *overruled on other grounds by Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059  
 5 (1997) (holding AEDPA only applicable to cases filed after statute's enactment). The instant  
 6 petition was filed after the enactment of the AEDPA and is therefore governed by its provisions.*

7 B. Standard of Review

8 The instant petition is reviewed under the provisions of the AEDPA. Van Tran v.  
 9 Lindsey, 212 F.3d 1143, 1148 (9th Cir. 2000). A state court's decision denying relief may be  
 10 reversed only if that decision is "contrary to, or involves an unreasonable application of, clearly  
 11 established federal law as determined by the Supreme Court of the United States." Id., at 1149  
 12 (quoting 28 U.S.C. § 2254(d)(1)). The distinction between the "contrary to" and "unreasonable  
 13 application of" provisions of § 2254(d)(1) were noted in Williams v. Taylor, 529 U.S. 362, 405-  
 14 09 (2000) and summarized by the Ninth Circuit in Van Tran v. Lindsey:

15 A state court's decision can be "contrary to" federal law either 1) if it  
 16 fails to apply the correct controlling authority, or 2) if it applies the controlling  
 17 authority to a case involving facts "materially indistinguishable" from those in a  
 18 controlling case, but nonetheless reaches a different result. A state court's  
 19 decision can involve an "unreasonable application" of federal law if it either 1)  
 correctly identifies the governing rule but then applies it to a new set of facts in  
 a way that is objectively unreasonable, or 2) extends or fails to extend a clearly  
 established legal principle to a new context in a way that is objectively  
 unreasonable. (internal citation omitted)." 212 F.3d at 1150.

20 In Jeffries v. Wood, 114 F.3d 1484 (9th Cir. 1997), the Ninth Circuit Court of Appeals,  
 21 sitting en banc, noted the effect of the AEDPA:

22 Under the amendments to Chapter 153, federal courts must restrict their legal  
 23 analysis to whether the state decision was contrary to or an unreasonable application of  
 24 "clearly established Federal law, as determined by the Supreme Court of the United  
 25 States." 28 U.S.C. § 2254(d)(1). The Act further restricts the scope of federal review of  
 26 mixed questions of law and fact. 28 U.S.C. § 2254(e). *De novo* review is no longer  
 27 appropriate; deference to the state court factual findings is." 114 F.3d at 1498.

28 Petitioner has the burden of establishing that the decision of the state court is contrary to or  
 involved an unreasonable application of United States Supreme Court precedent. Baylor v.  
Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996).

1       While habeas corpus relief is an important instrument to assure that individuals are  
 2 constitutionally protected, Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391-3392  
 3 (1983); Harris v. Nelson, 394 U.S. 286, 290, 89 S.Ct. 1082, 1086 (1969), direct review of a  
 4 criminal conviction is the primary method for a petitioner to challenge that conviction. Brecht v.  
 5 Abrahamson, 507 U.S. 619, 633, 113 S.Ct. 1710, 1719 (1993). In addition, the state court's  
 6 factual determinations must be presumed correct, and the federal court must accept all factual  
 7 findings made by the state court unless the petitioner can rebut "the presumption of correctness  
 8 by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); Purkett v. Elem, 514 U.S. 765, 115  
 9 S.Ct. 1769 (1995); Thompson v. Keohane, 516 U.S. 99, 116 S.Ct. 457 (1995); Langford v. Day,  
 10 110 F.3d 1380, 1388 (9th Cir. 1997).

11       C.     Ineffective Assistance of Counsel

12       Petitioner argues that trial counsel was ineffective for failing to investigate Petitioner's  
 13 mental state regarding his competence to stand trial and/or as a possible mental state defense to  
 14 the crimes charged. Petitioner contends that if counsel had conducted an investigation into his  
 15 mental history, he would have found evidence of his post-traumatic stress disorder ("PTSD").  
 16 Petitioner was diagnosed with PTSD approximately five (5) months before trial. (See  
 17 Psychiatric Report by Dan Dwyer, M.D., February 11, 1995, attached as Exhibit A to Petition for  
 18 Writ of Habeas Corpus.)<sup>5</sup> Petitioner argues that counsel could then have used this diagnosis to  
 19 support his section 1368 motion for a competency hearing, and to support a mental state defense.

20       1.     *General Standard of Review*

21       A claim of ineffective assistance of counsel is cognizable as a claim of denial of the  
 22 Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance  
 23 of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984). The  
 24 standard for judging any claim of ineffectiveness must be whether counsel's conduct so

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25  
 26       <sup>5</sup> In the psychiatric report, Dr. Dwyer states that Petitioner, although initially reluctant, explained that he  
 27 observed the shooting of his pregnant girlfriend and her sister. Petitioner explained that he was heavily involved in  
 28 substance abuse trafficking, and because of financial issues, trafficking persons from another country traced him  
 down and shot his pregnant girlfriend and her sister. Petitioner told Dr. Dwyer that his "mind was a thousand miles  
 away." Dr. Dwyer concluded that Petitioner's symptoms were suggestive of post traumatic stress disorder, and that  
 environmental cues could stimulate his traumatic memories. The parties do not dispute the facts of this report.

1 undermined the proper functioning of the adversarial process that the trial cannot be relied upon  
 2 as having produced a just result. Id.

3 In a petition for writ of habeas corpus alleging ineffective assistance of counsel, the court  
 4 must consider two factors. Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S.Ct. 838, 842 (1993);  
 5 Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994).  
 6 First, the petitioner must show that counsel's performance was deficient, which requires a  
 7 showing that counsel made errors so serious that he or she was not functioning as the "counsel"  
 8 guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. The  
 9 petitioner must show that counsel's representation fell below an objective standard of  
 10 reasonableness. Id., 466 U.S. at 688, 104 S.Ct. at 2064. The petitioner must identify counsel's  
 11 alleged acts or omissions that were not the result of reasonable professional judgment  
 12 considering the circumstances. Id., 466 U.S. at 690, 104 S.Ct. at 2066; United States v.  
 13 Quintero-Barraza, 78 F.3d 1244, 1348 (9th Cir. 1995). Judicial scrutiny of counsel's  
 14 performance is highly deferential. A court indulges a strong presumption that counsel's conduct  
 15 falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689,  
 16 104 S.Ct. at 2065; Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994).

17 Second, petitioner must show that counsel's errors were so egregious as to deprive  
 18 petitioner of a fair trial, one whose result is reliable. Strickland, 466 U.S. at 687, 104 S.Ct. at  
 19 2064. The Court cannot find prejudice simply because the outcome would have been different  
 20 without counsel's errors. Lockhart, 506 U.S. at 369-70, 113 S.Ct. at 842-43. The Court must  
 21 also evaluate whether the entire trial was fundamentally unfair or unreliable because of counsel's  
 22 ineffectiveness. Id.; Quintero-Barraza, 78 F.3d at 1345; United States v. Palomba, 31 F.3d 1456,  
 23 1461 (9th Cir. 1994). To set aside a conviction or sentence solely because the outcome would  
 24 have been different, but for counsel's error, may grant the petitioner a windfall to which the law  
 25 does not entitle him. Lockhart, 506 U.S. at 369-70, 113 S.Ct. at 842. Thus, if the Court finds  
 26 that counsel's performance fell below an objective standard of reasonableness, and that but for  
 27 counsel's unprofessional errors, the result of the proceeding would have been different, the Court  
 28

1 must then ask whether, despite the errors and prejudice, the trial was fundamentally fair and  
 2 reliable.

3 Having set forth the applicable standard for establishing ineffective assistance of counsel,  
 4 the Court will now addresse the specific instances upon which Petitioner's ineffective assistance  
 5 of trial counsel claims are based. In determining whether counsel's representation was deficient,  
 6 the Court will address counsel's failure to investigate, as it relates to the competency hearing *and*  
 7 the presentation of a mental state defense, simultaneously. Insofar as the Court finds deficient  
 8 performance, the Court will address the prejudice prong of Strickland as it relates to the  
 9 competency hearing and the presentation of a mental state defense, separately.

10       2.     *Counsel's Duty to Investigate*

11       In general, "counsel has a duty to make reasonable investigations or to make a reasonable  
 12 decision that makes particular investigations unnecessary." Strickland 466 U.S. at 691, 104 S.Ct.  
 13 at 2052; see also Seidel v. Merkle, 146 F.3d 750, 755 (9th Cir. 1998). Counsel must, at a  
 14 minimum, conduct a reasonable investigation enabling him to make informed decisions about  
 15 how best to represent the client. Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994). Failure  
 16 to conduct a reasonable investigation renders counsel's performance ineffective. Id., at 1456-  
 17 1457 (citing U.S. v. Gray, 878 F.2d 702, 711 (3d Cir. 1989) (holding that "[i]neffectiveness is  
 18 generally clear in the context of complete failure to investigate because counsel can hardly be  
 19 said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such  
 20 a decision could be made). However, counsel's duty of investigation is determined by the facts  
 21 he or she knows. See Ames v. Endell, 856 F.2d 1441, 1444 (9th Cir. 1988).

22       Where counsel fails to investigate a defendant's mental history, counsel's performance  
 23 will be found deficient where counsel had notice of the defendant's mental problems. In Seidel  
 24 v. Merkle, 146 F.3d 750 (9th Cir. 1998), the Ninth Circuit determined that counsel's failure to  
 25 conduct any investigation into his client's psychiatric history, despite "abundant signs in the  
 26 record" that his client suffered from mental illness, rendered counsel ineffective. Id., at 755. The  
 27 pre-trial record indicated that Seidel received psychiatric medication while awaiting trial, that he  
 28 had been treated at a V.A. hospital for a mental disorder, and that he had been hospitalized for

1 symptoms related to his mental condition. Id. In addition, Seidel's counsel was personally  
 2 aware of his clients mental problems. Id., at 756. Seidel testified that he told counsel about the  
 3 symptoms related to his mental condition, and this testimony was corroborated by counsel's  
 4 handwritten notes reflecting those conversations. Id. The court concluded that because counsel  
 5 had actual and constructive knowledge of Seidel's mental status, and "failed to conduct even a  
 6 minimal investigation in order to make an informed decision regarding the possibility of a  
 7 defense based on Seidel's mental illness," counsel's performance was deficient. Id. The court  
 8 further determined that if the jury had heard evidence of Seidel's PTSD and chronic brain  
 9 damage, "the jury in all likelihood would have returned a verdict of manslaughter instead of  
 10 murder." Id.

11 Similarly, in Bouchillon v. Collins, 907 F.2d 589, 597 (5th Cir. 1990), the Fifth Circuit  
 12 determined that where counsel was aware of defendant's mental problems, and where an insanity  
 13 defense was the only defense available, counsel's failure to conduct any investigation was "not a  
 14 tactical decision," and rendered counsel ineffective. The court stated, "[t]o do no investigation at  
 15 all on an issue that not only implicates the accused's only defense, but also his present  
 16 competency, is not a tactical decision." Id. (recognizing that "[i]t must be a very rare  
 17 circumstance indeed where a decision not to investigate would be 'reasonable' after counsel had  
 18 notice of the client's history of mental problems."). Again, however, the determination of  
 19 ineffective assistance turned upon whether counsel had notice of his client's problems. The court  
 20 recognized, "[w]here a condition may not be visible to a layman, counsel cannot depend on his or  
 21 her own evaluation of someone's sanity *once he has reason to believe an investigation is*  
 22 *warranted...*" Id. (emphasis in original); see also Wilson v. Henry, 185 F.3d 986, 990 (9th Cir.  
 23 1999) (holding that where it was not clear that counsel had reason to believe that a mental state  
 24 defense was warranted, a decision not to pursue such a defense is not unreasonable under  
 25 Stickland). Accordingly, whether counsel had a duty to investigate Petitioner's mental state  
 26 insofar as it related to Petitioner's competency *and/or* a possible defense turns on whether  
 27 counsel had actual or constructive notice of Petitioner's mental problems.

1       3. *Counsel's Performance Was Deficient*

2       To determine whether counsel's actions were deficient, the Court will begin its analysis  
 3 with a review of counsel's section 1368 motion. The arguments made in support of counsel's  
 4 motion allow the Court to determine whether counsel had notice of Petitioner's mental health  
 5 issues so as to require an investigation into Petitioner's mental history.

6       In presenting his section 1368 motion to the trial court, counsel stated that Petitioner  
 7 exhibited "bizarre behavior," had "numerous outbursts," and "has had [sic] wild – wildly  
 8 vacillating attitude toward me." (RT 17.)<sup>6</sup> Counsel further explained "at times Mr. Johnson is  
 9 real lucid and he's a big help to me...[o]ther times, trying to converse with him is essentially  
 10 impossible. I think that more than 50 percent of the time he is -- it is impossible to rationally –  
 11 for him to rationally assist me in this case. I think that there is substantial evidence that he is  
 12 incompetent to proceed in this matter." (RT 18.) Counsel explained that the only reason he was  
 13 bringing the motion was because of a conversation with Petitioner's mother the day before.  
 14 "[S]he is concerned that he is degenerating. She said that he had a serious auto accident when he  
 15 was about nine or ten years old, I think he is 30...[he] may have suffered some brain damage  
 16 which exists to this day." (RT 18-19.) Counsel also stated that Petitioner's mother gave him the  
 17 names of hospitals at which Petitioner may have been treated for this auto accident, and where he  
 18 received subsequent treatment. (RT 19-20.) Counsel told the trial court that he was also aware  
 19 that Petitioner had applied for disability insurance through social security, and that Petitioner was  
 20 a boxer and may have suffered cranial injuries as a result. (RT 20.)

21       Throughout the hearing, Petitioner objected to counsel's characterization of him as  
 22 incompetent. When the trial court asked Petitioner if he could cooperate with counsel, Petitioner  
 23 replied, "Sir, you got [sic] my undivided attention and full cooperation, sir...I been [sic] in trial  
 24 three times, your Honor. I never had a problem at all." (RT 22-23.)

25       The court denied counsel's motion because counsel failed to present substantial evidence  
 26 of Petitioner's incompetency and instead presented his own doubts as to Petitioner's competency.

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 28       <sup>6</sup> Unless otherwise noted, all references to "RT" refer to the Reporter's Transcript for the July 11-18, 1995,  
 proceedings.

1 The court cited the following as reasons for denying the motion: (1) there was no indication that  
2 the auto accident created any type of condition preventing Petitioner from cooperating with  
3 counsel or rendering him incompetent; (2) Petitioner's outbursts are not indicative of  
4 incompetence, as outbursts are common in criminal cases; (3) Petitioner has had no mental  
5 problems in the past; and (4) Petitioner has not been declared incompetent in his past court  
6 proceedings. (RT 23-24.)

7 Although Petitioner objected to counsel's motion, and the trial court denied the motion  
8 for lack of substantial evidence, this Court must determine what facts counsel had knowledge of  
9 to determine if counsel was deficient. The parties dispute whether counsel had knowledge of  
10 Petitioner's PTSD diagnosis. However, this point is irrelevant and is certainly not the end of the  
11 inquiry. The proper analysis turns on whether counsel knew enough about Petitioner's mental  
12 health so as to require him to conduct an investigation.

13 It is clear from the transcripts of the section 1368 hearing that counsel was aware of  
14 Petitioner's mental health issues. First, and perhaps most importantly, counsel states that  
15 Petitioner's mother told him Petitioner was involved in an auto accident when he was 9 or 10,  
16 and that he "**may have suffered some brain damage which exists to this day.**" (RT 19.)  
17 Counsel also states that Petitioner may have suffered cranial injuries as a result of his boxing  
18 career. (RT 20.) Counsel was therefore aware of at least two instances in which Petitioner may  
19 have suffered brain injury. (See also Velling Declaration at ¶ 3, attached as Exhibit 8 to  
20 Respondent's Answer (admitting that Petitioner's mother told him of Petitioner's auto accident  
21 as a child and that possible brain damage may have resulted).) Counsel was even told the names  
22 of possible hospitals at which Petitioner was treated after the auto accident. (RT 19-20.)

23 In further support of his motion, counsel described his own experiences with Petitioner.  
24 Counsel described Petitioner as having "numerous outbursts" in court, and having a "wildly  
25 vacillating attitude" towards counsel. (RT 17.) Counsel also described Petitioner as being "real  
26 lucid" and helpful at times, but admitted that at "[o]ther times, trying to converse with him is  
27 essentially impossible." (RT 18.) Counsel even went so far as to say, "I think that more than 50  
28 percent of the time he is – it is impossible to rationally – for him to rationally assist me in this

1 case.” (RT 18.) Although this may not have constituted “sufficient evidence” to warrant a  
 2 competency hearing pursuant to section 1368, surely it was enough to signal counsel that perhaps  
 3 an investigation was necessary. The Court therefore concludes that counsel had actual  
 4 knowledge of Petitioner’s mental health issues so as to warrant an investigation. Seidel v.  
 5 Merkle, 146 F.3d 750 (9th Cir. 1998) Counsel’s failure to conduct *any* investigation, let alone an  
 6 investigation sufficient to justify any possible “tactical decisions,” rendered his representation  
 7 ineffective. See Strickland, 466 U.S. at 691, 104 S.Ct. at 2052; see also Sanders v. Ratelle, 21  
 8 F.3d 1446, 1456 (9th Cir. 1994) (holding counsel ineffective where he neither conducted a  
 9 reasonable investigation nor made a showing of strategic reasons for failing to do so). As the  
 10 court recognized in Bouchillon, 907 F.2d at 597, “[i]t must be a very rare circumstance indeed  
 11 where a decision not to investigate would be ‘reasonable’ after counsel had notice of the client’s  
 12 history of mental problems.”

13 It is important to note that we are not faced with a situation where counsel initiated an  
 14 investigation, and after a certain point, concluded that further investigation would be fruitless, or  
 15 that a competency hearing or mental state defense was not, as a tactical matter, the best path to  
 16 follow. Instead, we have an attorney, who, despite numerous red flags concerning Petitioner’s  
 17 mental health, failed to conduct *any* investigation to determine how best to represent his client.  
 18 Counsel’s failure to conduct *any* investigation is especially egregious given counsel’s own  
 19 admission that a mental state defense was “the only plausible defense” for Petitioner. (See  
 20 Velling Declaration at ¶ 5, explaining why he made numerous unsupported references to  
 21 Petitioner’s mental state at the time of the crimes during closing arguments); Bouchillon v.  
 22 Collins, 907 F.2d 589, 597 (5th Cir. 1990) (holding that where counsel was aware of defendant’s  
 23 mental problems, and where an insanity defense was the only defense available, counsel’s failure  
 24 to conduct any investigation was “not a tactical decision,” and rendered counsel ineffective).

25 Counsel’s declaration reveals additional evidence in support of this Court’s finding that  
 26 counsel was deficient. Counsel states that he did not pursue a mental state defense, and  
 27 presumably did not conduct an investigation to support such a defense, because he “felt appellant  
 28 knew exactly what he was doing during all of the charged offenses, i.e., that he had the specific

1 intent to do what he did, and he went right ahead and did it." (Velling Declaration at ¶ 5.)  
 2 Additionally, during discussions as to whether Petitioner's leg irons should be removed, counsel  
 3 stated to the judge, "I am not so sure I am as confident as [Petitioner] is in his ability in beating  
 4 this case, but I don't think leg irons are necessary." (RT 49.) Certainly, where counsel admitted  
 5 that a mental state defense was Petitioner's "only plausible defense," it is incomprehensible how  
 6 counsel could substitute his own personal beliefs in place of his duties to provide Petitioner with  
 7 a constitutionally sufficient defense. See Wilcox v. McGee, 241 F.3d 1242, 1246 (9th Cir. 2001)  
 8 (holding that where there was no strategic reasons for counsel's failure to raise an "obvious and  
 9 meritorious" motion, counsel was ineffective); Bouchillon v. Collins, 907 F.2d 589, 597 (5th Cir.  
 10 1990); see also Harris By and Through Ramseyer v. Blodgett, 853 F.Supp. 1239, 1260  
 11 (W.D.Wash.,1994) (holding counsel ineffective where counsel, because of his personal opinion  
 12 of the defendant, failed to present mitigating evidence).

13 Accordingly, this Court determines that counsel's representation of Petitioner fell below  
 14 an objective standard of reasonableness, and was therefore deficient. The Court will now turn to  
 15 the second prong of Strickland, and determine whether counsel's deficient performance caused  
 16 Petitioner prejudice.

17 4. *Counsel's Deficient Performance Caused Petitioner Prejudice*

18 As set forth above, in addition to proving counsel was deficient, a petitioner must show  
 19 that counsel's errors were so egregious so as to deprive petitioner of a fair trial, one whose result  
 20 is reliable. Strickland, 466 U.S. at 687, 104 S.Ct. 2064. The Court cannot find prejudice simply  
 21 because the outcome would have been different without counsel's errors. Lockhart, 506 U.S. at  
 22 369-70, 113 S.Ct. at 842-43 (1993). The Court must also evaluate whether the entire trial was  
 23 fundamentally unfair or unreliable because of counsel's ineffectiveness. Thus, if the Court finds  
 24 that counsel's performance fell below an objective standard of reasonableness, and that but for  
 25 counsel's unprofessional errors, the result of the proceeding would have been different, the Court  
 26 must then ask whether, despite the errors and prejudice, the trial was fundamentally fair and  
 27 reliable.

1       The Court will begin its analysis with determining whether counsel's failure to  
 2 investigate Petitioner's mental health so as to support a mental state defense prejudiced  
 3 Petitioner.

4       By counsel's own admission, a mental state defense was Petitioner's "virtually...only  
 5 plausible defense." (Velling Declaration at ¶ 5.) Therefore, counsel's failure to investigate  
 6 Petitioner's mental health had serious consequences. In other words, counsel's deficient  
 7 performance essentially deprived Petitioner of sufficient evidence to support, as even counsel  
 8 admits, "virtually the only plausible defense." (Id.)

9       A review of counsel's closing argument confirms that counsel's repeated references to  
 10 Petitioner's "bizarre" behavior, although a half-hearted attempt to state a defense, was the only  
 11 defense presented. Counsel repeatedly asked the jury to consider what Petitioner had "in mind"  
 12 at the time of the incidents. For example, counsel states, "what exactly was going through  
 13 Johnson's mind. What does this fellow have in mind when he engages in these rather unusual  
 14 and bizarre acts." (RT 307.)

15       As the prosecution correctly pointed out to the jury, although Petitioner's counsel made  
 16 repeated references to Petitioner's "erratic unusual behavior," such behavior was not a defense to  
 17 the crimes charged. (RT 312.) The prosecution continued, "[t]here is [sic] specifics as to mental  
 18 defense in the law and you are not to be receiving any instructions that erratic behavior is a  
 19 defense to any of these crimes." (RT 312.) As the prosecution properly explained in closing  
 20 argument, defense counsel had not met his evidentiary burden to present a mental state defense,  
 21 and therefore defense counsel's repeated references to Petitioner's mental status were not to be  
 22 taken into account.

23       Initially, the Court notes that counsel's deficient performance, which resulted in  
 24 depriving Petitioner of his only plausible defense, may be reviewed under the exception to  
 25 Stickland, as set forth in United States v. Chronic, 466 U.S. 648, 104 S.Ct. 2039 (1984).  
 26 Although Strickland requires an analysis of prejudice once counsel's performance is deemed  
 27 deficient, the Supreme Court, in Chronic, held that "if counsel entirely fails to subject the  
 28 prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth

1 Amendment rights that makes the adversary process itself presumptively unreliable.” Id. 466  
 2 U.S. at 659, 104 S.Ct. at 2047.

3       Although a failure to conduct any investigation is generally reviewed under the Strickland  
 4 standard, Woodward v. Collins, 898 F.2d 1027, 1029 (9th Cir. 1990), counsel’s failure to  
 5 investigate in the instant case had a fatal result by depriving Petitioner of his only defense. In  
 6 United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991), counsel, in closing argument, conceded  
 7 to the jury that there was no reasonable doubt that his client robbed a bank. The court held that  
 8 this was “not merely a negligent misstep in an attempt to champion his client’s cause,” but was  
 9 instead “an abandonment of the defense of his client at a critical stage of the criminal  
 10 proceedings.” Id. The court further recognized that “an attorney who adopts and acts upon a  
 11 belief that his client should be convicted “fails to function in any meaningful sense as the  
 12 Government’s adversary.” Id. Counsel’s “statements conveyed to the jury his belief that his  
 13 client was guilty.” Id.

14       Similarly, by failing to investigate in an attempt to present sufficient evidence in support  
 15 of Petitioner’s only plausible defense, counsel adopted and acted upon his belief that his client  
 16 was guilty. As counsel admits, “I felt appellant knew exactly what he was doing during all of the  
 17 charged offenses, i.e., that he had the specific intent to do what he did, and that he went right  
 18 ahead and did it.” (Velling Declaration at ¶ 5.) Counsel also admitted to the trial judge that he  
 19 was not “as confident” as Petitioner in Petitioner’s ability to beat the conviction. (RT 49.)  
 20 Counsel’s belief in his client’s guilt and the resulting deficient performance entirely failed to  
 21 subject the prosecution’s case to meaningful adversarial testing, and the adversarial process itself  
 22 was rendered presumptively unreliable. See Chronic, 466 U.S. at 659, 104 S.Ct. at 2047. As  
 23 such, prejudice is presumed from counsel’s deficient performance.

24       Even if this Court were to continue its analysis under Strickland, the result is no different.  
 25 Petitioner was convicted of two counts of kidnap for robbery, in violation of Penal Code section  
 26 209(b), one count of kidnap, in violation of section 207, and two counts of second degree  
 27 robbery, in violation of section 212.5(c). The jury found the personal weapon use allegation  
 28 untrue, as alleged in one count of second degree robbery and one count of kidnap for robbery.

1       Although kidnapping is a general intent crime, the remainder of Petitioner's convictions  
 2 required specific intent. See People v. Davis, 10 Cal.4th 463, 519 (1995). Robbery requires the  
 3 specific intent to deprive the victim of his or her property permanently. See People v. Albert A.,  
 4 47 Cal.4th 1004, 1007 (1996) (holding that robbery is essentially larceny aggravated by use of  
 5 force or fear to facilitate the taking of property from the person or presence of the possessor).  
 6 Likewise, kidnap for robbery requires the that the specific intent to commit robbery be formed  
 7 before the "asportation" is undertaken. See People v. Gregory S., 149 Cal.Rptr. 216, 218 (1978).  
 8 Therefore, four of Petitioner's five convictions required specific intent.

9       Petitioner contends that if counsel had investigated his mental history, he would have  
 10 found evidence to support a mental state defense. He further argues that he would then have  
 11 been entitled to CALJIC 3.32, which instructs the jury that evidence of a mental disorder should  
 12 be considered "solely for the purpose of determining whether the defendant actually formed the  
 13 required specific intent, which is an element of the crime charged."

14       The Court finds that there is a reasonable probability that if the jury had been presented  
 15 with evidence of a mental state defense, it would not have found the requisite specific intent to  
 16 convict Petitioner of kidnap for robbery, and/or robbery. See eg., Seidel v. Merkle, 146 F.3d  
 17 750, 757 (9th Cir. 1998) (holding that had the jury been presented with evidence of Seidel's  
 18 mental illness, there is a reasonable probability that the jury would not have found malice). A  
 19 review of the trial transcripts reveals that Petitioner may not have had a solid grip on reality, both  
 20 during the events in question and during trial. On of the victims, Kimberly A., testified that  
 21 Petitioner "was very hyper" and "talked a lot about how he was a boxer and all these people that  
 22 he knew that were boxers and he said that the next day he was going to L.A. and he was going to  
 23 be in a boxing match..." (RT 59.) Kimberly A. continued, "he was ...talking a lot the whole time  
 24 and he would...talk to himself and he would repeat...famous basketball players' names..." (RT  
 25 59.) Moreover, the trial court had to repeatedly warn Petitioner to discontinue his outbursts  
 26 during trial. Petitioner was unable to do so, and was eventually removed from the proceedings.  
 27 (RT 285.) The trial court explained to the jury that Petitioner "is a bit hyperactive and he is –  
 28 well, the indication is that he will not or cannot restrain himself during these proceedings." (RT

1 287.) Given Petitioner's demeanor during trial, and at least one of his victim's description of  
 2 Petitioner during the incident, there is a reasonable probability that the jury would not have have  
 3 convicted Petitioner of kidnap for robbery, and/or robbery, had they been presented with  
 4 evidence of a mental state defense.

5 Additionally, Petitioner himself testified that each of his victims either approached him  
 6 for drugs, or eventually asked for drugs after agreeing to give Petitioner a ride. (RT 183-184,  
 7 204, 215-218.) Given Petitioner's overall demeanor and his possible delusional state, the Court  
 8 finds there is a reasonable probability that had the jury been given evidence of a mental state  
 9 defense, they may have determined that Petitioner truly believed he was buying drugs for his  
 10 victims, instead of intending to deprive them of their property.<sup>7</sup>

11 Although this Court is certainly unable to determine whether the jury would have found  
 12 Petitioner did not act with the necessary specific intent, the Court finds that there is a reasonable  
 13 probability of such an outcome. More importantly, despite counsel's errors and the resulting  
 14 prejudice, the Court cannot say that Petitioner's trial was fundamentally fair and reliable.  
 15 Petitioner was deprived of his only defense because of counsel's failure to investigate, a defense  
 16 which had a reasonable probability of success given the above factors.<sup>8</sup>

17 The Court determines that the California state courts' denial of Petitioner's ineffective  
 18 assistance of counsel claim was erroneous, and an unreasonable application of clearly established  
 19 federal law, as announced by the United States Supreme Court in Strickland.<sup>9</sup> See Van Tran v.  
 20 Lindsey, 212 F. 3d 1143, 1154 (9th 2000); Weighall v. Middle, 215 F.3d 1058, 1061-62 (9th Cir.  
 21

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22  
 23 <sup>7</sup> This is especially so given the mistrial as to one of the incidents, and the jury's finding that Petitioner did  
 not use a weapon during the incident involving Travis L.

24 <sup>8</sup> Because the Court determined that counsel's failure to investigate so as to present a mental state defense  
 25 resulted in prejudice, the Court will not consider whether counsel's failure to investigate so as to present evidence in  
 support of the section 1368 motion caused Petitioner prejudice.

26 <sup>9</sup> The Court notes that the Fifth District Court of Appeal denied Petitioner's petition for writ of habeas  
 27 corpus without comment, and the California Supreme Court denied Petitioner's petition for review without  
 comment. Where the state court does not provide the basis for its denial, "an independent review of the record is  
 required to determine whether the state court clearly erred in its application of controlling federal law." Delgado v.  
Lewis, 223 F.3d 976, 982 (9th Cir.2000) (citing Tran, 212 F.3d at 1153).

1 2000) (determining that an ineffective assistance of counsel claim should be analyzed under the  
2 “unreasonable application” prong of 28 U.S.C. § 2254(d)).

3 D. State Court’s Failure to Grant Evidentiary Hearing

4 Petitioner next argues that the state courts violated his due process and equal protection  
5 rights by refusing to grant him an evidentiary hearing. Petitioner argues that despite his prima  
6 facie showing of ineffective assistance of counsel, both the Kern County Superior Court and the  
7 Fifth District Court of Appeal denied his petitions for writ of habeas corpus without holding an  
8 evidentiary hearing.

9 As a threshold matter, Respondent contends that Petitioner did not exhaust this claim for  
10 relief. A petitioner can satisfy the exhaustion requirement by providing the highest state court  
11 with a full and fair opportunity to consider each claim before presenting it to the federal court.

12 Picard v. Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 512 (1971); Johnson v. Zenon, 88 F.3d 828,  
13 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full and fair  
14 opportunity to hear a claim if the petitioner has presented the highest state court with the claim's  
15 factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365, 115 S.Ct. 887, 888 (1995) (legal  
16 basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

17 Additionally, the petitioner must have specifically told the state court that he was raising a  
18 federal constitutional claim. Duncan, 513 U.S. at 365-66, 115 S.Ct. at 888; Keating v. Hood, 133  
19 F.3d 1240, 1241 (9th Cir.1998).

20 A review of Petitioner's April 19, 1999, petition for review in the California Supreme  
21 Court indicates Petitioner exhausted this claim. In his petition for review, Petitioner states, “the  
22 State’s refusal to grant Petitioner an evidentiary hearing violates his 14th Amendment rights to  
23 due process and equal protection of the laws.” (Exhibit 7, attached to Respondent’s Answer.)  
24 The Court therefore finds that Petitioner has exhausted this claim for relief.

25 In any event, Petitioner’s claim is moot. As the Court has granted the petition based on  
26 the above claims, the Court will not review this claim on the merits.

## ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. The petition for writ of habeas corpus is GRANTED, subject to the State's right to retry Petitioner; and
2. The State must, within ninety (90) days of the date of service of this order, inform the Court whether it will retry Petitioner.

IT IS SO ORDERED.

DATED:

~~SANDRA M. SNYDER  
UNITED STATES MAGISTRATE JUDGE~~

United States District Court  
for the  
Eastern District of California  
May 24, 2002

\* \* CERTIFICATE OF SERVICE \* \*

1:99-cv-05982

Johnson

v.

Terhune

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on May 24, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

SMS-P

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BY:   
Deputy Clerk